Supreme Court, U. S.
FILED
AUG 27 1980
MICHAEL RODAK, JR., CLERK

No. 80-60

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ELVINA M. HERWEG, by her husband and next friend, Darrell E. Herweg; and DARRELL E. HERWEG, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT D. RAY, individually and in his capacity as Governor of the State of Iowa; and KEVIN J. BURNS, individually and in his capacity as Commissioner of the Iowa Department of Social Services,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The issue presented by this petition is whether the Department of Health and Human Services ("HHS") has properly interpreted the Medicaid statute to require the so-called "SSI states" to employ the conditions and rules of the Supplemental Security Income ("SSI") program in making Medicaid eligibility determinations. The Eighth Circuit, in a split decision affirming the district court, invalidated HHS regulations which had implemented the appropriate SSI rules for evaluating the availability of income and resources to an institutionalized individual from his or her non-institutionalized spouse. These rules, which forbid the SSI states from deeming income and resources available for more than one or six months, depending on the eligibility of the non-institutionalized spouse, had been applied to the 35 SSI states, of which Iowa was one. The district court and the Eighth Circuit upheld Iowa's explicit determination not to follow these requirements.

Petitioners have argued that affirmance of the district court violated the requirements of the Medicaid and SSI statutes, 42 U.S.C. §§1396, et seq. and 1382, et seq., respectively, and directly contradicted the understanding of every court which had previously considered the relationship between those statutes in the SSI states. See Petition, at 19-21 &nn. 11-17. Respondents have offered nothing in their Opposition to which Petitioners have not already responded, but since the filing of the Petition, another court has announced a decision which carefully describes the nature of the integration between the SSI and Medicaid statutes in the SSI states, thereby requiring this Supplemental Brief.

That decision has affirmed the district court invalidation of the HHS deeming regulations applicable to the 209(b) states. Gray Panthers v. Administrator, Health Care Financing Administration, Department of Health and Human Services, No. 79-1334 (D.C. Cir., July 29, 1980) aff'g sub nom. Gray Panthers v. Secretary, Department of Health, Education and Welfare, 461 F.Supp. 319 (D.D.C. 1978).[1/] Petitioners noted that the district court in that case had recognized that the SSI states are required to use the SSI rules in determining Medicaid eligibility, Petition, at 20 & n. 15; but the Court of Appeals' decision sets out in significant detail the relevant difference between 209(b) and SSI states.

[1/] The Court of Appeals opinion is reported at CCH Medicare & Medicaid Guide, par. 30,588. Citations in this brief will be to both the Slip Opinion and the CCH Medicare & Medicaid Guide.

The majority opinion by Chief Judge Wright begins by explaining the nature of the Medicaid program, with particular emphasis on the 209(b) option and its purposes. In setting out the nature of that option, the court directly supports Petitioners' position:

> "42 U.S.C. §1396a(a) provides that Medicaid assistance must be made available to all individuals who qualify for cash benefits under the Supplemental Security Income (SSI) program, Title XVI of the Social Security Act, 42 U.S.C. §1381, et seq. (1976). In these 'SSI states' Medicaid eligibility is determined by statute in accordance with uniform federal standards." Gray Panthers v. Administrator, supra, Slip Op., at 4; CCH Medicare & Medicaid Guide, par. 30,588 at p. 10,415.

Applying these principles specifically in the deeming context, the court outlines, as did Judge McMillian in his opinion below, how deeming was established and limited by the SSI statute in the SSI states. The court acknowledges that deeming is permissible between spouses living together, and then describes how the rules differ when they separate:

> "Where both spouses are otherwise eligible for Medicaid, and one spouse is institutionalized, the pooling of funds continues for six months. The effect of this scheme is thus to 'deem' a portion of the noninstitutionalized

> individual's income and resources to be available for support of his or her spouse. After six months of institutionalization only the income and resources of the institutionalized spouse are considered for determining eligibility, and the 'deeming' ceases. 42 U.S.C. §1382c(b). Where only one of the spouses is otherwise Medicaid-eligible, pooling of income must cease with the first month of institutionalization. 42 U.S.C. §1382c(f)." Id., at 6; CCH Medicare & Medicaid Guide, par. 30,588, at p. 10,416 (footnote omitted).

Finally, the court considers the government's claim that as Medicaid deeming is permitted in the SSI states on a limited basis, it must also be proper in the 209(b) states. Recognizing that the purpose of the six-month pooling of income and resources after separation for determining SSI eligibility was exclusively to deter fraud, id., at 9, CCH Medicare & Medicaid Guide, par. 30,588, at p. 10,417,[2/] the court rejects any intimation that deeming in the SSI states is relevant to deeming in the 209(b) states. In so doing, it once again underlines the requirement that the SSI states follow the SSI eligibility conditions:

> "We do not believe the statutorily required 'deeming' in SSI states should

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2/ See Petition, at 28 n. 23.

be given such dispositive weight with respect to 209(b) jurisdictions. We perceive the governing principle in SSI states to be that the institutionalized individual is to be held solely responsible for his or her own medical care, with 'deeming' a very narrow exception. See 42 U.S.C. §1382(a)(1)." Id., at 9; CCH Medicare & Medicaid Guide, par. 30,588 at p. 10,417. (Emphasis supplied; footnote omitted.)

This "governing principle" is precisely what petitioners have argued throughout this case, and it is the recognition of this principle which has eluded the district court below and the four members of the Eighth Circuit who affirmed that decision.

In addition, Judge MacKinnon, in a separate opinion, does not dissent from this aspect of the majority's analysis. His sole disagreement is with the majority's determination that deeming is not permissible between separated spouses in the 209(b) states. Id., at 1; CCH Medicare & Medicaid Guide, par. 30,588, at p. 10,419 (MacKinnon, J., concurring in part and dissenting in part). Indeed, he expressly acknowledges that the SSI states are bound by the SSI rules:

"States participating in the Medicaid program fall into two categories: those which determine eligibility under the Supplemental Security Income program ('SSI') Title XVI of the Social Security Act, 42 U.S.C. §1381, et seq.

(1976) and those states which have elected a more restrictive eligibility criteria. . . ." Id., at 2 n. 1; CCH Medicare & Medicaid Guide, par. 30,588, at p. 10,422 n. 1 (MacKinnon, J., concurring in part and dissenting in part).

There is no disagreement on the Gray Panthers panel as to the nature of the SSI states and the rules which Congress had required from them and which HHS has further detailed.

The Court of Appeals for the District of Columbia Circuit has carefully detailed the nature of the eligibility requirements which adhere in the SSI and 209(b) states. In so doing, it has repudiated the analysis of Judge Ross in the opinion below, and has recognized what has been apparent to all other courts which have considered the issue: that there is a necessary dependence of Medicaid eligibility conditions on SSI eligibility conditions. Without that relationship, there was no cause for Congress to provide the 209(b) option. But Congress did provide that choice, so that states which were dissatisfied with the SSI eligibility conditions would not be so restricted.

Iowa did not select that option, and consequently it should be locked into the SSI eligibility conditions. By permitting Iowa to go its own way, however, the Eighth Circuit has ignored explicit federal statutes, and the analyses of all other courts which have considered the issue. The opinion of the Court of Appeals for the District of Columbia Circuit adds significant support to that

prevailing analysis. This Court should therefore recognize the unwarranted deviation of the Eighth Circuit, and issue a writ to review that decision.

Respectfully submitted,

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